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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. ~~1323.~~ 920

LUCIEN BIRDSEYE, PLAINTIFF IN ERROR,

vs.

ROWENA SHAEFFER, E. R. OLIVER, AND JOHN McCLANE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

FILED OCTOBER 11, 1889.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1323.

LUCIEN BIRDSEYE, PLAINTIFF IN ERROR,

vs.

ROWENA SHAEFFER, E. R. OLIVER, AND JOHN McCLANE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

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1 *Caption.*

LUCIEN BIRDSEYE
vs. } No. 226.
F. W. SHAEFFER *et als.*

Be it remembered that at the regular November term, A. D. 1888, of the circuit court of the United States for the western district of Texas, at San Antonio, the following proceedings were had in said court in the above numbered and entitled cause, the same having been removed from the district court of Nueces county, Texas, to the said circuit court upon transcript from the district court of said Nueces county, Texas:

2 *Petition for Writ of Error.*

To the honorable judges of the Supreme Court of the United States:

The petition of Lucien Birdseye respectfully shows—

1st. That in a cause pending in the circuit court of the United States in and for the western district of Texas, at San Antonio, duly removed thereto from the district court of Nueces county, State of Texas, by order of such State court to that effect duly made on the second day of September, A. D. 1885, upon the petition, affidavit, and bond of your petitioner, Lucien Birdseye, all in due form and sufficient in law and in fact, and the transcript of the record thereof duly filed in said circuit court, at San Antonio, and the cause duly entered and docketed therein on the second day of November, A. D. 1885, and numbered 226 on the docket, in which cause the said Lucien Birdseye, a citizen of the State of New York and resident of the city of New York, in said State of New York, is plaintiff and Rowena Shaeffer, E. R. Oliver, and John McClane, all citizens of the State of Texas and residents of the county of Nueces, in said State of Texas, are defendants, the said circuit court, on the motion of the said defendants, did, on the sixth day of December, A. D. 1888, render and make a judgment and order in words as follows:

"LUCIEN BIRDSEYE
vs. } No. 226.
F. W. SHAEFFER *et al.*

On this the sixth day of December, 1888, came the parties, by their attorneys; and thereupon came on to be heared the motion of the defendants to remand this cause to the district court of Nueces county, from which it was removed to this court, and praying the 2½ court to enquire into the truth of the affidavit of the plaintiff for removal and the grounds thereof, to which action of the court, as prayed for by the defendants, the plaintiff then and there, among other things, objected because his right to removal had been adjudged by this court prior to the passage of the act of 3rd March, 1887, under which the motion to remand by defendants was now made, and his right of trial in this court was a vested right, and that the act of March 3rd, 1887, so far as it sought to enquire into the truth of the affidavit and the grounds thereof, or sought to establish any rule as to the question of prejudice at this time, was repugnant to the Constitution of the United States.

Whereupon, the court having heared the testimony adduced by the parties respectively, and having duly considered the same, and it appearing to the court that the act of March 3rd, 1887, under which this application to remand is made, is constitutional, and that there was no cause for removal upon the grounds set out by the plaintiff in his affidavit, it is ordered and adjudged that this cause be remanded to the district court of Nueces county, Texas, being the State court from which it was removed to this court; to which ruling and judgment the plaintiff, by his attorneys, then and there in open court excepted.

It is further ordered and adjudged that the defendants do have and recover of the plaintiff and J. C. Russell and James W. Ward, his sureties on his bond for removal, all their costs in this behalf expended, for which execution may issue.

It is further ordered that the clerk of this court do certify this order and judgment to the district court *court* of Nueces county, Texas."

3 2nd. That such judgment is in effect and in law a final judgment of dismissal of said cause.

3rd. That the subject-matter of said suit in controversy therein is of the val*l*ue of $250,000.00.

4th. That in the proceedings, as also in the rendition of such judgment of the plea in said cause in said circuit court, before the judges thereof, between your petitioner and the said defendants, manifest and material error hath happened and been committed, to the great damage of your petitioner.

5th. That your petitioner desires to have the said judgment and cause removed to the Supreme Court of the United States for revision and correction.

Wherefore your petitioner prays for approval of his error bond herewith presented, for a writ of error to remove said cause and judgment into the Supreme Court of the United States in order that the same may be revised and corrected, and for citation to the said defendants, requiring them to appear and defend such writ before the Supreme Court of the United States at the next term thereof, to be holden in Washington on the second Monday in October, A. D. 1889.

BETHEL COOPWOOD,
HANCOCK, SHELLEY & HANCOCK,
G. R. SCOTT, *Attorneys for Pl'ff in Error.*

4 [Endorsed:] No. 226. Lucien Birdseye, pl'ff in error, *vs.* F. W. Shaeffer *et al.*, def'ts in error. Petition for writ of error. Filed June 7, 1889. W. C. Robards, cl'k, by W. McMaster, dep. Bethel Coopwood, att'ys for pl'ff in error.

5 *Writ of Error Granted.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the circuit court of the United States, fifth circuit, in and for the western district of Texas, holding sessions at San Antonio, in said district, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said circuit court, before you, between Lucien Birdseye, who is plaintiff, and Rowena Shaeffer, E. R. Oliver, and John McClane, who are defendants, No 226 on the docket of said circuit court, at San Antonio, in said district, a manifest error hath happened, to the great damage of the said Lucien Birdseye, who is plaintiff in error herein, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and 6 customs of the United States should be done.

The Seal of the U. S. Circuit Court, Western Dist. Texas, San Antonio.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court, the seventh day of June, in the year of our Lord one thousand eight hundred and eighty-nine, and seal of our said circuit court, at San Antonio.

W. C. ROBARDS,
Clerk of the Circuit Court of the United States, Western District of Texas, at San Antonio,
By W. McMASTER, *Deputy.*

The foregoing writ of error is refused because the law forbids appeals or writs of error in such cases.

This March 29, 1889.

T. S. MAXEY, *Judge.*

[Endorsed:] No. 226. Lucien Birdseye, pl'ff in error, *vs.* Shaeffer *et al.*, def'ts in error. Writ of error. Filed June 7, 1889. W. C. Robards, cl'k, by W. McMaster, dep.

The refusal of the writ was endorsed as above prior to the publication of the act of Feb'y 25, 1889. I now allow it, although doubting the application of the latter act to this case.

This 7th day of June, A. D. 1889.

T. S. MAXEY, *Judge.*

7 *Writ of Error Bond.*

LUCIEN BIRDSEYE }
vs. }
F. W. SHAEFFER *et al.* }

Know all men by these presence that we, Lucien Birdseye, as principal, and ——— and —— ——, as sureties, are held and firmly bound unto Rowena Shaeffer, G. R. Oliver, and John McClane, defendants in error, in the full and just sum of five hundred dollars, to be paid to the said defendants in error, their certain attorney, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 25th day of March, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas lately, at a regular term, in a suit pending in the United States circuit court in and for the western district of Texas, at San Antonio, between Lucien Birdseye, as plaintiff, and Rowena Shaeffer, G. R. Oliver, and John McClane, as defendants, a judgment was rendered against the said Lucien Birdseye, and the said Lucien Birdseye having prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment aforesaid, and a citation having issued, directed to the said defendants, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday in October next:

Now the condition of the above obligation is such that if
8 the said Lucien Birdseye shall prosecute his writ of error to
effect and pay all costs if he fail to make his plea good, then
the above obligation to be void; else to remain in full force and
virtue.

LUCIEN BIRDSEYE,
By his attorney, BETHEL COOPWOOD.
E. H. CALDWELL.
S. W. RANKIN.

Sealed and delivered in the presence of—
——.——.

THE STATE OF TEXAS, *County of Nueces:*

E. H. Caldwell and S. W. Rankin, being duly sworn, depose and say and each for himself says that he is worth $1,000 over and above all just debts and liabilities and exemptions.

E. H. CALDWELL.
S. W. RANKIN.

Sworn to and subscribed before me this 26th day of March, 1889.
[Seal Notary Public, County of Nueces, Texas.]

DELMAS GIVENS,
Notary Public, Nueces Co., Texas.

Approved this June 7, 1889.
T. S. MAXEY, *Judge.*

[Endorsed:] No. 226. Lucien Birdseye, pl'ff in error, *vs.* F. W. Shaeffer *et al.*, def'ts in error. Writ of error bond. Filed June 7, 1889. W. C. Robards, cl'k, by W. McMaster, dep.

9 *Citation in Error.*

The United States of America to Rowena Shaeffer, G. R. Oliver, and John McClane, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, persuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Texas, at San Antonio, wherein Lucien Birdseye is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 7th day of June, in the year of our Lord one thousand eight hundred and eighty-nine.

Attest W. C. Robards, clerk of the circuit court of the United States for the western district of Texas, at San Antonio.

[The Seal of the U. S. Circuit Court, Western Dist. Texas, San Antonio.]

W. C. ROBARDS,
Clerk U. S. Circuit Court, West. Dist. Texas.

Allowed by—
T. S. MAXEY, *Judge.*

10 [Endorsed:] No. 226. Lucien Birdseye, pl'ff in error, *vs.* Shaeffer *et al.*, def'ts in error. Citation in error. Filed June 7, 1889. W. C. Robards, cl'k, by W. McMaster, dep.

Received this citation in error at San Antonio on the 28th day of June, 1889, and executed on the same day by delivering to McCampbell & Wilsh and Stayton and Kleberg, attorneys for the defendants, a certified copy of this writ.

PAUL FRICKE,
U. S. Marshal for West. Dist. Texas,
By ADDISON KILGORE, *Deputy.*

10½ *Original Petition. Filed Febr'y 24th, 1885. P. McDonough, Clerk D. C., N. C.*

Plaintiff's original petition.

THE STATE OF TEXAS, *County of Nueces:*

In District Court of said County.

To said district court:

Lucien Birdseye, hereinafter styled plaintiff, complaining of F. W.

Shaeffer, E. R. Oliver, and John McLane, hereinafter styled defendants, respectfully shows:

1st. That plaintiff is a citizen of the State of New York and resides in the city of New York, in said State of New York, and all of the defendants are citizens of the State of Texas and reside in said county of Nueces.

2d. That plaintiff is the legal and equitable owner and on the first day of March, 1883, was lawfully possessed and seized as of fee simple of all that certain tract or parcel of land known as the "Rincon del Oso," and lying and being situated in said county of Nueces, and more particularly described and bounded as follows: Beginning on the right margin of the Nueces river at the "Refugio," for the first monument, thence south to the monument and over aforesaid monument, the line between these two monuments forming the division between this tract and that called "Barranco Blanco;" thence east to the "Cayo del Oso" or seff of the Oso creek, this line forming division between this tract and that called "Rincon de Corpus Christi;" thence with the margin of the waters of the Oso and the "Laguna Madre" (now called Corpus Christi) Bay eastward to the "paso or reef crossing;" thence northward with the margin of the "Laguna," now called Nueces Bay, and the Nueces river to the place of beginning, the four principal monuments being the Refugio on the right margin of the Nueces river, the
11 northwest corner; that on the prairie, the southwest corner; the "Cayo del Oso" as southeasterly corner, and that of the "paso" or reef crossing as the northeasterly corner of this tract, which comprises all of the land embraced within the abutta and boundaries following, to wit: Bounded on the west by the "Barranco Blanco" tract; on the south by the "Rincon de Corpus Christi" tract and the Callo del Oso; east by the "Laguna," now called Corpus Christi Bay, and north by that part of the "Lag-na" now called Nueces Bay and the Nueces river up to the "Refugio," being the same tract originally granted to Enrique Villareal, and confirmed by the State of Texas by act of the Legislature past- February 10th, 1852, which tract of land is of the value of two hundred and fifty thousand dollars.

3d. That thereafter, to wit, on the said first day of March, 1853, defendants wrongfully and forcibly entered upon said premises and ejected plaintiff therefrom, and they still unlawfully withhold from plaintiff the possession thereof, to plaintiff'- damage ten thousand dollars.

4th. That there are and were large quantities of trees and timber growing on said land of great value, and said land annually produces large quantities of grass of excellent quality for grazing purposes and of great value, and the defendants have cut down, carried away, and appropriated to their own use large quantities of such timber, to the amount in value of ten thousand dollars, and they have grazed, used, and appropriated large quantities of timber — grass, so produced by and upon said land, to the amount in value of ten thousand dollars.

5th. That by means of all the wrongs, injuries, and tresspasses so

committed by the defendants as aforesaid plaintiffs *have* been
12 and *are* greatly injured, to his damage thirty thousand dollars.

Wherefore plaintiff prays that defendants be cited to answer this petition, and for judgment for the restitution of the said premises, and for his said damages and all his costs in this behalf expended.

BETHEL COOPWOOD AND
G. R. SCOTT,
Attorneys for Plaintiffs.

Endorsed: Lucien Birdseye *vs.* F. W. Schaeffer *et als.* No. 1584. Original petition. This action is brought as well to try title as for damages. Bethel Coopwood and G. R. Scott, attorneys for plaintiff. Filed Feb'y 24th, 1885. P. McDonough, clerk D. C., N. Co.

Plaintiff's Petition to Make Rowena Schaeffer Executrix of Last Will of F. W. Schaeffer, Party Defendant in this Cause.

Plaintiff's petition to make parties.

LUCIEN BIRDSEYE
vs.
F. W. SHAEFFER *et als.*

Suit in United States circuit court, western district of Texas, at San Antonio.

Now comes the plaintiff in this suit and respectfully shows:

1st. That F. W. Schaeffer, one of the defendants herein, has departed this life, and that his death was duly suggested in open court, and thereupon, to wit, on the — day of ——, A. D. 1886, leave of the court was duly had and obtained to make the proper persons parties defendants herein in lieu of the said deceased.

2d. That, as plaintiff has now ascertained, Rowena Shaeffer, widow of the said deceased, is his sole heir and executrix of his last
13 will and testament, by appointment therein made, and has duly qualified as such upon proper and legal probating thereof, and is the legal representative of the said F. W. Shaeffer, deceased, and a proper and necessary party to be made a defendant herein.

3d. That the said Rowena Shaeffer resides in the county of Nueces, State of Texas.

Wherefore plaintiff prays that the said Rowena Shaeffer be made a defendant herein in the place and stead of the said defendant, F. W. Shaeffer, now deceased, and that a *scire facias* be issued for her, requiring her to appear and defend herein according to law.

BETHEL COOPWOOD,
G. R. SCOTT, AND
HANCOCK & SHELLY,
Attorneys for Plaintiff.

Endorsed: No. 226. Lucien Birdseye *vs.* F. W. Shaeffer *et al.* Petition of plaintiff to make legal representative of the deceased defendant, F. W. Shaeffer, a party defendant, and for *scire facias.* Filed March 21, 1887. W. C. Robards, clerk.

Order of Court to Make Def't F. W. Schaeffer'- Representatives Parties to this Suit.

LUCIEN BIRDSEYE
vs. } No. 226.
F. W. SHAEFFER *et al.*

NOVEMBER 3, A. D. 1886.

The death of the defendant, F. W. Shaeffer, being suggested, it is ordered that this cause be continued to make his representatives parties.

14 *Writ of Sci. Fa. to Mrs. Rowena Shaffer, Making Her a Party Defendant. Issued* 21*st March,* 1887, *and Filed* 5*th April,* 1887.

The President of the United States to the marshal of the western district of Texas, Greeting:

Whereas Lucien Birdseye heretofore, to wit, in the November term, in the year of our Lord one thousand eight hundred and eighty-six, in the circuit court of the United States of the fifth circuit in and for the western district of Texas, at San Antonio, in a cause then and there pending in said circuit court, wherein he, the said Lucien Birdseye, is plaintiff and F. W. Shaeffer, John McClane, and E. R. Oliver are defendants, numbered 226 on the docket of said court, did duly suggest to said circuit court, in open court, that the said F. W. Shaeffer departed this life and ask- leave of said circuit court to make the proper persons parties defendant in said cause as the legal representatives of the said deceased; and such leave was then and there duly granted by said circuit court, by an order duly entered upon its minutes, to wit, on the 3d day of November, 1886, of the following tenor: "The death of the defendant, F. W. Shaeffer, being suggested, it is ordered that this cause be continued to make his representatives parties;" and the said Lucien Birdseye has filed in said court his petition reciting such facts, and that he has ascertained that Rowena Shaeffer, of the county of Nueces and State of Texas, widow of the said deceased, is the true and only legal representative of said deceased, she being made by the will of said deceased his only, sole,
15 universal heir and the administrat-ix of his last will and testament, now duly probated, and praying that she be made a party defendant in said suit in the place and stead of the said F. W. Shaffer, deceased, and that *scire facias* issue for her as provided by statute, requiring her to appear and defend in said cause, now pending in said circuit court, at the next regular term thereof, to be begun and holden at its court-rooms, in the city of San

Antonio, county of Bexar and State of Texas, on the first Monday in May next; and we, being willing that what is just in this behalf should be done, do, according to the form of the statute in such cases made and provided, command you that you make known to the said Rowena Shaffer that she is required to appear before our said circuit court at the next regular term, to be begun and holden on the 1st Monday, being the 2d day of May, A. D. 1887, at its court-rooms, in the city of San Antonio, county of Bexar, and State of Texas, then and there to defend in said cause in the place and stead of the said defendant, F. W. Shaeffer, now deceased, if it shall seem expedient for her so to do, and further to do and receive what our said court shall then and there consider of her in this behalf; and have you then and there this writ with your action thereon. Herein fail not, but of this writ make due return.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court hereto affixed, at San Antonio, Texas, this 21st day of March, A. D. 1887.

[L. S.] W. C. ROBARDS,
Cl'k of said Circuit Court,
By T. M. MILLETT, *Dep.*

16 *Marshal'- Return on Sci. Fa.*

Received this writ this 24th day of March, 1887, and served same this 28th day of March, 1887, by delivering to Mrs. Rowena Shaeffer in person a true copy of this writ.

JOHN T. RANKIN,
U. S. Marshal,
By N. E. ELSWORTH, *Dep.*

Endorsed: No. 226. In U. S. circuit court, western district of Texas. Lucien Birdseye *vs.* F. W. Shaeffer *et als.* *Scire facias* to Mrs. Rowena Shaeffer. Issued March 21, 1887. W. C. Robards, clerk, by T. M. Millette, deputy. Filed 5th day of April, A. D. 1887. W. C. Robards, cl'k.

17 *Original Answer of F. W. Shaeffer. Filed* 31*st July,* 1885. *P. McDonough, Clerk.*

In the District Court of Nueces County. Summer Term, 1885.

LUCIEN BIRDSEYE
vs.
F. W. SHAEFFER *et als.*

Now comes the defendant, F. W. Shaeffer, by his attorneys, and, excepting to the plaintiff's petition, says that the same is insufficient in law for the said plaintiff to have or maintain this action, because it appears therefrom that no valid cause is therein set up against the defendant.

And, further, it appears from said petition there is no sufficient description of the land sued for, either in the quantity of land or metes and bounds.

Wherefore this defendant prays that judgment of court as to the sufficiency of the pet-ion, and that he be dismissed with his costs.

McCAMPBELL & GIVENS,
Attorneys for Def'd't, F. W. Shaeffer.

LUCIEN BIRDSEYE
vs.
F. W. SHAEFFER *et als.*

And now comes the defendant, F. W. Shaeffer, by his attorn-ys, and says that heretofore, to wit, at the Galveston term, January, A. D. 1884, of the supreme court of the State of Texas, in a certain suit therein pending on appeal from the district court of Nueces county, in which suit these defendants were appellants and H. W. Berry, executor of the estate of H. L. Kinney, deceased, and the said Lucien Birdseye, now the plaintiff in this suit, were the appellees; that in this court, from which said appeal was taken, the said Lucien Birdseye was intervenor and coplaintiff; that said suit was for the same cause of action in the plaintiff's petition mentioned; that at the trial of said cause in this court the plaintiff and intervenor
18 received judgment against these defendants. From said judgment of this court these defendants appealed to the supreme court of Texas, and the said supreme court reversed and rendered judgment thereon as follows:

"The judgment is reversed and, the court proceeding to render such judgment here as should have been rendered in the court below, it is adjudged that the plaintiff take nothing by this suit, and that the defendants recover their costs in this court and in the court below."

And this defendant says that said judgment of the supreme court is final and remains in full force and effect, and by the decision of the supreme court in said cause it is adjudicated and determined that the lands claimed by this defendant are not within the boundaries of the lands therein claimed by said Birdseye; all of which the defendant is ready to verify by the record.

And this defendant now pleads the said judgment of the supreme court of the State of Texas as a bar to plaintiff's right to recover herein. And the defendant prays judgment of the court if the said plaintiff ought to have or maintain this action against him.

McCAMLY & GIVENS,
Att'ys for Def'd't, F. W. Shaeffer.

19 *Original Answer of F. W. Shaeffer Continued.*

LUCIEN BIRDSEYE
vs.
F. W. SHAEFFER *et al.*

And now comes the defendant, F. W. Shaeffer, by his attorneys, and, in the event that his aforesaid pleas, demurrer, and exceptions shall have been overruled, for answer to plaintiff's petition says he is not guilty of the supposed wrongs, injuries, and trespasses laid to his charge, or any or either of them, in manner and form as said plaintiff hath thereof complained against him; and of this the said defendant puts himself upon the country.

And for further plea in this behalf the said defendant, F. W. Shaeffer, — that said plaintiff ought not to have or maintain his said aforesaid action thereof against this defendant because, he says, that he, this defendant, is the true and lawful owner of eleven tracts of land (sections or fractional sections) in the county of Nueces, described as follows:

1. Six hundred and forty (640) acres of land situated and described as follows: In Nueces county, known as survey No. 405, on the waters of Oso creek, a tributary of Laguna Madre, about nine miles west from Corpus Christi, by virtue of land scrip No. 1741, issued to said Beatty, Seale, and Forward by the Commissioner of the General Land Office May 8th, 1875, and transferred to said Shaeffer May 28th, 1875: Beginning at a post at N. W. corner of survey No. 403, scrip No. 1740, B., S., & F., the S. W. corner of this survey, thence north 1,900 varas set a post for N. W. corner of this survey; thence east 1,900 varas set a post for N. E. corner of this survey; thence south at 1,900 varas a post for S. E. corner; thence west 1,900 varas to the beginning. Patent No. 200, vol. 35.

2d. Six hundred and forty acres (640) of land situated and described as follows: In Nueces county, known as survey No. 403, on the waters of Oso creek, a tributary of Laguna Madre, about
20 9½ miles S. 85° W. from Corpus Christi, by virtue of land
scrip No. 1740, issued to said Beaty, Seale, & Forward by Commissioner of the General Land Office May 18th, 1875, and transferred to said Shaeffer May 28th, 1875: Beginning at a post, N. E. corner of survey No. 401, scrip No. 1739, for S. E. corner of this survey, thence north 1,900 vrs. to a post for N. E. corner; thence west 1,900 vrs. to a post for N. W. corner; thence south 1,900 vrs., a post at N. W. corner of survey No. 401 for S. W. corner of this survey; thence with said survey east 1,900 vrs. to the beginning. Patent No. 201, vol. 35.

3d. Six hundred and forty (640) acres of land situated and described as follows: In Nueces county, known as survey No. 417, on the waters of Oso creek, a tributary of the Nueces river, about 10 miles N. 77° W. from Corpus Christi, by virtue of land scrip No. 1–1045, issued to said Beaty, Seale, and Forward by the Commissioner of the General Land Office Jan'y 8th, 1875, and transferred to said Shaeffer Feb'y 2, 1875: Beginning at a post for corner of survey No. 418 for N. W. corner of this survey, thence east 1,900 vrs., put a post for N. E. corner of this survey; thence south 1,900 vrs., put a post for S. E. corner of this survey; thence west 1,900 vrs., put a post for S. W. corner of this survey; thence N. 693 vrs., pass the S. E. corner of survey No. 418, and N. E. of No. 413 at 1,900 vrs., the beginning. Patent No. 202, vol. 35.

4th. Six hundred and forty (640) acres of land situated and described as follows: In Nueces county, known as survey No. 415, on

the waters of Oso creek, a tributary of the Laguna Madre, about 9 miles 81° W. from Corpus Christi, by virtue of land scrip No. 962, issued to said Adams, Beaty, & Moulton by the Commissioner of the General Land Office January 9th, 1875, and transferred
21 to said Shaeffer Feb'y 2d, 1875: Beginning at a post at the
N. E. corner of sur. No. 405, scrip No. 1741, B., S., & F., for S. E. corner of this survey, thence west 1,900 vrs. to the N. W. corner of said survey, a post for S. W. corner of this survey; thence north 1,900 varas, a post, the N. E. corner of survey No. 411, for N. W. corner of this survey; thence east 1,900 vrs., set a post for N. E. corner of this survey; thence south 1,900 vrs. to the beginning. Patent No. 203, vol. 35.

5th. Six hundred and forty (640) acres of land situated and described as follows: In Nueces county, known as survey No. 411, on the waters of Oso creek, a tributary of Laguna Madre, about 10 miles N. 82° W. from Corpus Christi, by virtue of land scrip No. 960, issued to said Adams, Beaty, and Moulton by the Commissioner of the General Land Office January 9th, 1875, and transferred to said Shaeffer Feb'y 2d, 1875: Beginning at a post for N. E. corner of survey No. 409, scrip No. 959, A., B., M., for N. E. corner of this survey, thence west 1,900 varas, set a post for S. W. corner of this survey and N. W. corner of survey No. 409; thence north 1,900 varas, a post for N. W. corner of this survey; thence east 1,900 vrs., set a post, the N. E. corner of this survey; thence south 1,900 vrs. to the beginning. Patent No. 204, vol. 35.

6th. Six hundred and forty (640) acres of land situated and described as follows: In Nueces county, known as survey No. 409, on the waters of Oso creek, a tributary of Laguna Madre, about 10 miles west of Corpus Christi, by virtue of land scrip No. 959, issued to said Adams, Beaty, and Moulton by the Commissioner of the General Land Office January 9th, 1875, and transferred to said
Shaeffer Feb'y 2d, 1875: Beginning at a post at the N. W.
22 corner of survey No. 405, made for assignee of Beatty, Seale,
& Forward, crt. No. 1741, for the N. E. corner of this survey, thence south 1,900 varas to the S. W. corner of said survey, the S. E. corner of this survey; thence west 1,900 varas, set a post for the S. W. corner of said survey; thence north 1,900 varas, set a post for the N. W. corner of this survey; thence east 1,900 varas to the beginning. Patent No. 206, vol. 35.

7th. Six hundred and forty (640) acres of land situated and described as follows: In Nueces county, known as survey No. 401, on the waters of Oso creek, a tributary of the Laguna Madre, about 9½ miles south 79° W. from Corpus Christi, by virtue of land scrip No. 1739, issued to said Beatty, Sceale, and Forward by the Commissioner of the General Land Office May 18th, 1875, and transferred to said Shaeffer May 28th, 1875: Beginning at a post on the north boundary of a survey of 1,476 acres for J. D. Smith at S. W. corner of survey No. 402, this scrip, for S. E. corner of this survey, thence north 1,583 varas, pass its N. W. corner, & at 1,900 varas set a post in the pra-rie for N. E. corner of this survey; thence W. 1,900 vrs., set a post for N. W. corner of this survey; thence south

1,900 vrs. to the boundary of said Smith's survey, set a post for S. W. corner; thence east 1,900 vrs. to the beginning. Patent No. 207, vol. 35.

8th. Six hundred and fourteen (614) acres of land situated and described as follows: In Nueces county, known as survey No. 419, on the waters of Nueces river, about 10 miles N. 72° W. from Corpus Christi, by virtue of land scrip No. 1–1046, issued to said Beatty, Seale, & Forward by the Commissioner of the General Land Office Jan'y 8th, 1875, and transferred to said Shaeffer Feb'y 2d, 1875: Beginning at the N. corner of survey No. 418, thence N. 45° E. 1,184 vrs. to a post on Nueces river for N. corner of this survey; thence with the meanders of said river S. 78° E. 307 vrs., N. 86° E. 612 vrs. for corner of this survey; thence south 22,271 varas for S. E.
23 corner of this section; thence west 94 varas to corner; thence north 49 varas; thence west 1,655 vrs. to corner; thence north 1,382 vrs. to the beginning. Patent No. 208, vol. 35.

9th. Six hundred and nine & $\frac{8}{10}$ (609.8) acres of land situated and described as follows: In Nueces county, known as survey No. 421, on the waters of Nueces river, a tributary of Nueces Bay, about 8½ miles N. 71° W. from Corpus Christi, by virtue of land scrip No. 1–1047, issued to said Beatty, Seale, and Forward by the Commissioner of the General Land Office January 8th, 1875, and transferred to said Shaeffer Feb'y 2d, 1875: Beginning at the N. E. corner of survey No. 422, thence north 853 vrs. for N. W. corner of this survey; thence east 708 vrs. to right bank of Nueces river; thence with the meanders of said Nueces river as follows: S. 53° E. 360 vrs., S. 85° E. 830 vrs., a post for N. E. corner of this survey; thence south 1,733 vrs., post for S. E. corner of this survey; thence west 1,822 vrs. for S. W. corner of this survey; thence north 1,169 vrs. to the beginning. Patent No. 217, vol. 35.

10th. Five hundred and ninety-eight (598) acres of land situated and described as follows: In Nueces county, known as survey No. 413, on the waters of the Oso creek, a tributary of Laguna Madre, about 11 miles N. 82° W. from Corpus Christi, by virtue of land scrip No. 961, issued to said Adams, Beatty, and Moulton by the Commissioner of the General Land Office Jan'ry 9th, 1875, and transferred to said Shaeffer Feb'y 2d, 1875: Beginning at a post at the N. E. corner of survey No. 412 for S. E. corner of this survey, thence west 1,326 vrs., a post for S. W. corner of this survey; thence north 2,138 vrs. to N. W. corner of survey No. 414; thence west 110 vrs., post for corner; thence north 361 vrs., post for N. W. corner of this survey; thence E. 1,447 vrs., set a post for N. E. corner of this survey; thence south at 693 vrs., pass ash N. W. corner of survey No. 411 at 2,499 varas, to the beginning. Patent No. 231, vol. 35.

24 11th. Six hundred and forty acres (640) of land situated and described as follows: In Nueces county, known as survey No. 407, on the waters of Oso creek, a tributary of Laguna Madre, about 10 miles S. 82° W. of Corpus Christi, by virtue of land scrip No. 1742, issued by the Commissioner of the General Land Office May 18th, 1875, and transferred to said Shaeffer May 28th, 1875:

Beginning at *at* a post at S. W. corner of survey No. 401, B., S., & F., certificate No. 1739, for S. E. corner of this survey, thence west 36 vrs., stake for corner; thence S. 54 vrs., stake for corner; thence with meanders of Oso creek, left bank, N. 77¾° W. 167 varas, N. 82¾ W. 320 varas, N. 49½ W. 655 varas, S. 79¼ W. 522 vrs., N. 69 W. 670 vrs., N. 54¾ W. 288 vrs., N. 24¾ W. 480 vrs., N. 51¼ W. 150 vrs. to east boundary of survey No. 167, B., S., & F., post for S. W. corner this survey; thence with said survey N. 80 vrs., post for N. W. corner of this survey; thence east 800 vrs., post for corner; thence north 526 vrs., post for corner; thence east 1,900 varas to post at S. W. corner of survey No. 401 and N. W. corner of survey No. 401 for B., S., & F. for N. E. corner of this survey; thence south 1,900 varas to the beginning. Patent No. 266, vol. 35.

And this defendant, F. W. Shaeffer, claiming to be the true and lawful owner of said eleven tracts of land, has had and held, under title and cover of title from and under the State of Texas, peaceable adverse and continuous possession of the lands and tenements above described for a period of three years next before the commencement of this suit.

And this defendant further says, with the exception of the eleven tracts above described, patented to himself from the State of Texas, he claims no land within the boundaries or supposed boundaries of plaintiff's claim; all of which he is ready to verify.

25 And this defendant alleges that plaintiff's assertion of right and ownership in the above-described lands and tenements is a fraud and injury upon this defendant's rights and ownership thereof by depreciating and lessening the market value thereof and preventing this defendant from selling said land at a fair and reasonable price.

Wherefore this defendant, F. W. Shaeffer, prays the judgment of the court quieting him in the possession of the lands and tenements above described, and that plaintiff and all persons claiming under him be perpetually enjoined from asserting any right thereto or in any manner disturbing this defendant's right thereto.

McCAMPBELL & GIVENS,
Attorneys for Defendant, F. W. Shaeffer.

Endorsed: No. 1584. Lucien Birdseye *vs.* F. W. Shaeffer *et als.* Original answer of F. W. Shaeffer. Filed July 31st, 1885. P. McDonough, cl'k D. C., N. Co.

Original Answer of John McLane and E. R. Oliver. Filed July 31*st*, 1885.

LUCIEN BIRDSEYE
vs.
F. W. SHAEFFER *et al.*

Suit pending in the district court of Nueces county, to July term, 1885.

And now comes the defendants in the above-styled cause and, ex-

cepting to plaintiff's petition, say that the same is insufficient in law for the said plaintiff to have and maintain this action, because it appears therefrom that no valid cause is therein set up against these defendants, and, further, because it appears from said petition that there is no sufficient description of the land sued for, either in designating the quantity of land or by metes and bounds. Wherefore
defendants pray the judgment of the court as to the suffi-
26 ciency of the petition, and that they be dismissed with their
costs.

McCAMPBELL & GIVENS,
Att'ys for Jno. McLane, Defendant.
STAYTON & KLEBERG,
Att'ys for E. R. Oliver, Defendant.

Plea of Res Adjudicata of the Defendants, Jno. McClane and E. R. Oliver.

LUCIEN BIRDSEYE
vs.
F. W. SHAEFFER *et als.*

Suit pending in the district court for Nueces county.

And now comes the defendant-, John McLane and E. R. Oliver, and plead *res adjudicata* as to all lands described in plaintiff's petition which are situated south of and west of the "Cayo del Oso," and for said plea say that heretofore, to wit, at the Galveston term, 1884, of the supreme court of the State of Texas, in a suit therein pending on appeal from the district court of Nueces county, in which suit the defendants herein upon said appeal were appellants and H. W. Berry, executor of the estate of H. L. Kinney, deceased, and Lucien Birdseye, now plaintiff in this suit, were appellees; that in this court, from which said appeal of said suit was taken, the said Lucien Birdseye (plaintiff herein) was intervenor and coplaintiff with the said H. W. Berry, executor of H. L. Kinney, deceased; that said suit was numbered 1189 on the docket of the district court of Nueces county, Texas, and styled H. W. Berry, executor of the estate of H. L. Kinney, deceased, and Lucien Birdseye, intervenor, *vs.* F. W. Shaeffer, John McClane, and E. R. Oliver; that said suit was for the same cause of action in plaintiff's petition contained, involving the same title to the same parties to the same lands in controversy in this cause; that at the trial of said cause No. 1189 in the said district court of Nueces county the plaintiff and intervenor recovered
judgment against these defendants for the lands in question;
27 that from said judgment of this court these defendants, who
were also defendants in said cause, appealed to the supreme
court of Texas, and the said supreme court reversed — and rendered judgment therein in favor of the defendants, as will more fully appear from a certified copy thereof, which is hereto attached, marked Exhibit "A," and made a part of this plea; that said judgment of the supreme court was a final judgment rendered by a court of competent jurisdiction and has never been set aside, but remains in full

force and effect; that by the said judgment so rendered in said cause it is adjudicated and finally determined that none of the lands claimed by the defendants, John McClane and E. R. Oliver, situated south of the Cayo del Oso, *and none of the lands claimed by the defendants, John McClane and E. R. Oliver, situated south of the Cayo del Oso* and none of the lands claimed herein by the defendant, F. W. Shaeffer, are within the boundaries the said "Rincon del Oso," claimed by plaintiff herein to have been granted to Enrique Villareal and confirmed by the State of Texas by act of the Legislature passed Feb'y 10th, 1852, under which plaintiff claimed title in said cause No. 1189, and under which same so-called grants plaintiff also claims title in this cause, and that while said action was brought in the form of a suit of trespass to try title it in fact only involved a question of boundary; all of which these defendants are ready to verify by the record; and these defendants now here plead said judgment of the supreme court of Texas as a bar to plaintiff's right to recover herein, and of this these defendants ask the judgment of the court.

STAYTON AND KLEBERG,
Attorneys for Defendant, E. R. Oliver.
McCAMBELL & GIVENS,
Attorneys for Defendant, Jno. McClane.

28

LUCIEN BIRDSEYE
vs.
F. W. SHAEFFER *et al.*

And now comes the defendants herein, their demurrer, exceptions, and plea of *res adjudicata* first having been overruled, and for further plea herein, should the same be required, say that this is in fact a second suit or action by the plaintiff, Lucien Birdseye, against these defendants, in the form of trespass, to try title, and that said plaintiff should not be permitted to maintain this action against these defendants herein, because he fails to join H. W. Berry, executor of H. L. Kinney, deceased, who was a coplaintiff with him in the action heretofore instituted by said plaintiff and said H. W. Berry, executor as aforesaid, against these defendants, in the district court of Nueces county, Texas, involving the same cause of action in this suit, and in which suit final judgment was rendered by the supreme court of Texas upon an appeal of said cause, and which said judgment is hereto attached and marked Exhibit "A" and made a part of this plea, and of this these defendants ask the judgment of the court, and that they be dismissed with their costs.

STAYTON & KLEBURG,
Att'ys for Defendant, E. R. Oliver.
McCAMPBELL & GIVENS,
Att'ys for Defendant, John McClane.

General Denial of Plea of Disclaimer by Defendant, E. R. Oliver.

LUCIEN BIRDSEYE
vs.
F. W. SHAEFFER *et als.*

And now comes the defendant, E. R. Oliver, his demurrer and pleas hereinbefore filed first — been overruled, and for answer herein says that he disclaims any and all title as to any of the land described in plaintiff's petition which is situated northeast of the "Cayo del Oso," and as to all land described in plaintiff's petition situated southwest of the said Cayo del Oso, mentioned in
29 plaintiff's petition, he pleads not guilty, and says he is not
guilty of the wrongs and injuries alleged in plaintiff's petition, and of this he puts himself upon the country.

STAYTON & KLEBERG,
Att'ys for Defendant, E. R. Oliver.
McCAMPBELL & GIVENS,
Att'ys for Defendant, John McClane.

Plea of Not Guilty of Jno. McClane.

LUCIEN BIRDSEYE
vs.
F. W. SHAEFFER *et als.*

And now comes the defendant, John McClane, his demurrer, exceptions, and plea hereinbefore filed first having been overruled, and, further answering herein, should the same be required, *and* says that he is not guilty of the supposed wrongs, injuries, and trespasses complained of in plaintiff's petition, and of this he puts himself upon the country.

McCAMPBELL & GIVENS,
Att'ys for Jno. McClane, Defendant.

30 *Plaintiff's Bill of Exceptions No. 1. Filed Dec. 8, 1888.*

Bill of exceptions No. 1 taken by plaintiff.

LUCIEN BIRDSEYE
vs. No. 226.
F. W. SHAEFFER *et als.*

In Circuit Court of the United States for the Western District of Texas, at San Antonio.

First.

Be it remembered that on the 6th day of November, 1888, this cause was regularly reach- on the docket and called for trial, and the parties came, by their respective counsel, and announced themselves ready for trial, and thereupon the motion of the defend's to remand this cause to the district court of Neuces county, State of Texas, came on to be heard by the court, which motion is in words as follows:

Defendants' Motion to Remand. Filed —— 14*th*, 1887.

LUCIEN BIRDSEYE
vs.
F. W. SHAEFFER *et als.*

In the Circuit Court of the United States in and for the Western District of Texas, at San Antonio.

Comes the defendants herein and respectfully show to the court that it appears from the record herein that heretofore, on or
31 about the first day of September, A. D. 1885, this cause was removed to this court from the district court of Nueces county, Texas, upon the affidavit of the plaintiff herein that he had reason to believe and did believe that from prejudice and local influence he would not be able to obtain justice in said State court, and the trial of said cause has not yet been had in this court.

That, contesting the cause of said removal and the truth of said affidavit, these defendants say that the same is in no manner true that the said plaintiff cannot obtain justice in the said State court, from whence this cause was removed, and they say that there is no prejudice or local influence, as alleged in said affidavit of the plaintiff, to prevent him from obtaining justice upon a trial of this cause in the said State court, the district court of Nueces county.

And these defendants, under and by virtue of the second section of an act of Congress approved March third, A. D. 1887, entitled "An act to amend the act of Congress approved March 3d, 1875, entitled An act to determine the jurisdiction of circuit courts of the United States, to regulate the removal of causes from State courts, and for other purposes; and to further regulate the jurisdiction of circuit courts of the United States, and for other purposes," now here make application to this honorable court to examine into the truth of the said affidavit for removal by the said plaintiff and the grounds thereof, and that, upon such examination and the truth of this contestation appearing, the court make its decree that the said cause was improperly removed from the said State court, and order that the same be remanded to the said State court, the district court of Nueces county, and at the costs of the said plaintiff, Lucien Birdseye.

McCAMPBELL & SON AND
STANLY WELCH.
Counsel for Defendants.

32 THE STATE OF TEXAS,
County of Nueces.

Personally appeared before the undersigned authority John McClane, one of the defendants in the above numbered and entitled cause, and, being by me first duly sworn, deposes and says that the allegations contained in the foregoing application are true; that there is no prejudice or local influence, as alleged by the plaintiff herein in his petition for removal, whereby the said plaintiff will not be able to obtain justice in the said State court, the district court of Nueces county, Texas.

JOHN McCLANE.

Sworn to and subscribed to before me this 27th day of Sept., 1887.

DELMAS GIVENS,
[SEAL.] *Notary Public, Nueces County, Texas.*

Endorsed: No. 226. U. S. C. court. Lucien Birdseye *versus* F. W. Shaeffer *et al.* Motion to remand. Filed October 14, 1887. W. C. Robards, clerk.

And thereupon plaintiff proved by the record of this cause in this court that the same was removed from the district court of Nueces county, State of Texas, to this court on the 2d day of September, 1885, by the following proceedings, to wit: The petition, affidavit, and bond of the plaintiff, duly filed in said State court of such court removing the same, which are as follows:

No. 1. Petition for Removal.

In the District Court of Nueces County, State of Texas.

LUCIEN BIRDSEYE
vs. } No. 1584.
F. W. SHAEFFER *et al.*

Petition for transfer of this cause to the circuit court of the United States.

To the honorable district court of Nueces county, State of Texas:

Your petitioner, Lucien Birdseye, respectfully shows that 33 he is the plaintiff in the above-entitled suit, and that the same was commenced on or about the 24th day of February, 1885, in said district court; that your petitioner was at the time of the bringing said suit and still is a citizen of the State of New York and resident thereof, and all of the defendants in said cause were then and still are citizens of the State of Texas and residents thereof; that said action was brought for the purpose of trying title to and recovering possession of a certain tract of land situated in said county of Nueces, of the value of two hundred and fifty thousand dollars, and for thirty thousand dollars damages; and the matter in dispute in said suit exceeds in value the sum of five hundred dollars, exclusive of costs.

Your petitioner further states that the suit has not been tried, but is now pending for trial in the district court of the (28th) twentyeight- judicial district of Texas, for the said county of Nueces, and that he has reason to believe and does believe that, from prejudice and local influence, he will not be able to obtain justice in such State court, and that he desires to remove said suit into the circuit court of the United States for the western district of Texas, at San Antonio, in pursuance of the statute in that behalf provided, to wit, subdivision 3 of section 639 of the Revised Statutes of the United States.

Your petitioner further says that he has filed herewith the affidavit required by statute in such cases, and offers here his bond, executed by him, with good and sufficient surety, in the penal sum of five hundred dollars, as required by law in such cases.

Your petitioner therefore prays that the said bond may be accepted as good and sufficient, and that the said suit may be removed
into the next circuit court of the United States in and for the
34 western district of Texas, at San Antonio, pursuant to the
statute aforesaid, and that no further proceedings may be had
therein in this court.

COOPWOOD & COOPWOOD,
G. R. SCOTT,
HANCOCK & SHELLY,
Attorneys for Plaintiff.

No. 2. Affidavit of W. Ward.

No. 3. Affidavit to petition for removal.

THE STATE OF TEXAS, }
County of Nueces. }

J, W. Ward, being duly sworn, says on his oath that he is the agent and attorney-in-fact of the plaintiff in the above-entitled suit; that he has read and known the contents of the annexed and foregoing petition, and that the matters of fact therein stated are true, and that he makes the affidavit because said plaintiff, L. Birdseye, is absent from the State of Texas.

J. W. WARD.

Sworn to and subscribed before me this 1st day of September, 1885.

P. McDONOUGH,
Cl'k D. C., N. Co.

Endorsed: Lucien Birdseye *vs.* F. W. Shaeffer *et als.* No. 1584. Petition for removal of cause into the U. S. circuit court. Filed Sept. 1st, 1885. P. McDonough, cl'k D. C., N. Co.

Affidavit of Lucien Birdseye.

In the District Court of Nueces County, State of Texas.

LUCIEN BIRDSEYE
vs. } No. 1584.
F. W. SCHAEFFER *et als.*

Affidavit for removal to U. S. circuit court.

THE STATE OF NEW YORK,
City and County of New York, } *ss:*

I, Lucien Birdseye, being duly sworn, do say that I am the plaintiff in the above-entitled cause; that I have reason to believe and do believe that from prejudice and local influence I will not be able to obtain justice in said State court.

LUCIEN BIRDSEYE.

35 Subscribed to by said Lucien Birdseye in my presence and by him sworn to before me, at said city of New York, this 29th day of July, A. D. 1885.

FRANK H. PAIRINS,
[SEAL.] *Notary Public, Kings Co.*

But filed in N. Y. Co.

Also subscribed by the said Lucien Birdseye in my presence and by him sworn to before me, at said city of New York, this 29th day of July, A. D. 1883.

J. F. D. SOLIS,
[SEAL.] *Notary Public* (182), *City and County of New York.*

Endorsed: No. 1584. Lucien Birdseye *vs.* F. W. Shaeffer *et als.* Affidavit of plaintiff for removal of the cause to the U. S. circuit court. Filed Sept. 1, 1885. P. McDonough, cl'k D. C., N. Co.

No. 3. Bond for Removal.

In District Court of Nueces County, State of Texas.

LUCIEN BIRDSEYE
vs. } No. 1584.
F. W. SHAEFFER *et als.*

Know all men by these presents that Lucien Birdseye, as principal, and J. W. Ward and J. C. Russell, of the county of Nueces, State of Texas, as sureties, are held and firmly bound unto F. W. Shaeffer, E. R. Oliver, and John McClane, the defendants in the above-entitled cause, in the penal sum of five hundred dollars; for the payment of which, well and truly to be made, we bind ourselves, jointly and severally, firmly by these presents. The condition of this obligation is such that if the said Lucien Birdseye shall enter

and file in the next session of the circuit court of the United States in and for the western district of Texas, at San Antonio, on the first day of its session, copies of all process, pleadings, depositions, testimony, and other proceedings in a certain cause or action now pending in the district court of the county of Nueces and State of
36 Texas, in which said *said* Lucien Birdseye is plaintiff and the said F. W. Shaeffer, E. R. Oliver, and John McClane are defendants, and shall well and truly pay all costs that may be awarded by the said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, and shall do such other appropriate acts as by the statutes of the United States are required in this behalf upon the removal of a suit from a State court into the said United States court, then this obligation to be void; otherwise in full force.

Dated September 1st, 1885.

LUCIEN BIRDSEYE,
By G. R. SCOTT,
His Att'y of Record.
J. W. WARD.
J. C. RUSSELL.

THE STATE OF TEXAS, }
County of Nueces. }

We, J. W. Ward and J. C. Russell, of said county, the sureties named in the foregoing bond, being duly sworn, do each severally for himself say that he is a resident of the State of Texas and a p'erty holder therein; that he is worth the sum of five hundred dollars over and above all his debts and liabilities and exclusive of property by law exempt from execution; that he has property in the State of Texas liable to execution of the value of more than five hundred dollars.

J. W. WARD.
J. C. RUSSELL.

Sworn to and subscribed before me this 1st day of September, A. D. 1885.

PAT'K McDONOUGH,
Clerk District Court, Nueces County, Texas.

Endorsed: No. 1584. L. Birdseye *vs.* F. W. Shaeffer *et als.* Bond for removal of cause into the U. S. circuit court. Filed Sept. 1st, 1885. P. McDonough, clerk D. C., N. C.

37 *No 4. Order of Removal.*

At the July term of the district court of Nueces county, begun and holden in the court-house of said county, at the city of Corpus Christi, on the 16th Monday after the first Monday in April, A. D. 1885, being the 27th day of July, of said year 1885, on the 2d day of September, 1885.

Present: Honorable Thos. W. Dodd, special judge, duly commissioned July 29th, 1885, and qualified in this cause August 4th, 1885.

Court opened in due form.

Defendants' Motion to Remand.

L. BIRDSEYE
vs.
F. W. SHAEFFER *et als.* } No. 1584. Trespass to Try Title.

This cause coming on to be heard upon the pleadings and proceedings herein, and on the petition, affidavits, and bond filed herein by the plaintiff, dated September 1st, 1885, under statute of the United States, and the plaintiff and defendants appearing by their respective counsels, and on motion of Coopwood & Coopwood, G. R. Scott and Hancock & Shelly, plaintiff's attorneys, it is ordered that the security offered by the plaintiff be accepted and said bond approved, and that this State court proceed no further in this cause, and that this cause be removed into the United States circuit court in and for the western district of Texas, at San Antonio.

And it is further ordered that the exceptions of defendants to the petition, affadavit, and bond be, and the same are, overruled, the defendants excepting to this ruling of the court.

And that the transcript of the record of the cause from said State court was duly filed in this court, and the cause entered and docketed on the second day of November, 1885, and that there-
38 after the defendants filed in this court a motion to remand the same to said State court; which motion is in words as follows:

In the Circuit Court of the United States for the Western District of Texas, at San Antonio.

LUCIEN BIRDSEYE,
vs.
F. W. SHAEFFER *et als.* } No. 226.

Now come the defendants and move the court to remand this cause to the district court of Nueces county, State of Texas, from whence it came, because—

1st. This *the* court has no jurisdiction of the cause, and this cause has been removed without due process of law.

2d. Because the affidavit for removal is not made in accordance with law, and said affidavit is insufficient in law, in this, that the same does not set forth *matter* with sufficient certainty and fullness the grounds for removal of this cause, and that said affidavit is too vague, indefinite, and uncertain in its terms to form the proper basis for the petition and bond for removal filed in this cause, and because it does not appear from said affidavit that the plaintiff herein could not be able to obtain justice in said State court, in which the same was pending when the same was called for trial; and it appears that the affidavit for removal was made July 29th, 1885, and the removal was made the — day of September, 1885, and it was not to be presumed that the alleged prejudice and local influence extended to the time that the said removal was made.

3d. The said bond fails to comply with the conditions required by
law, and because the bond for removal is not signed by said
39 petitioner or by his legally authorized agent to sign said
bond, and because an attorney of record in a case has not authority to sign such bond.

4th. That it appears from the record of the court from — this cause was removed that other and necessary parties who are citizens and residents of said county of Nueces, State of Texas, jointly interested with the plaintiff and claim the lands sued for; that said persons having and claiming a joint interest with said plaintiff and H. W. Berry and Martin Himojos, executors of H. L. Kinney, deceased, and J. W. Ward and J. C. Russell are the same parties who appear as sureties on said bond, and said Ward and Russell are not competent sureties, and because the affidavit of petitioner and the bond for removal are not simultaneous, the affidavit being dated 29 July, 1885, and the bond on which the removal was made was signed by G. R. Scott, att'y of record, who had no authority to sign such bond, and the bond for removal signed by J. W. Ward, of a previous date, was not conditioned as required by law, and failed to comply with the requirements for the payment of costs.

5th. And in support of this motion these defendants refer to a certified copy of an agreement between the plaintiff herein and J. C. Russell and J. W. Ward, of date 7th of Feb'y, 1878, which appears in the transcript hereof, and defendants pray that the same may be considered as a part hereof.

6th. And, for further grounds why this court should remand the same and should not take any jurisdiction thereof, these defendants
show that between the plaintiff herein, Lucius Birdseye, and
40 these defendants the matter and question involved in this
suit have — fully and finally adjudicated and determined by a court having jurisdiction thereof, to wit, the supreme court of the State of Texas, in the case of F. W. Shaeffer *et al. vs.* H. W. Berry, executor, *et al.*; that in said suit Lucien Birdseye was a party as intervenor; that said cause was styled on the docket of said supreme court 1492, first assignment, F. W. Shaeffer *et al. vs.* H. W. Berry, executor, *et al.*, appeal from Nueces; that said judgment in said cause was in favor of these defendants and against said Lucien Birdseye and others; that said judgment is in full force and effect, and in no manner vacates, set- aside, or superseed-s; and these defendants say that said judgment is a bar to any other or further action in this court or any other court in relation to the matters herein involved, and these defendants refer to said judgment, which is shown in transcript hereof, and pray that same may be considered as part of this motion.

7th. And as to the interest of the estate — H. L. Kinney, deceased, in the lands in controversy in this suit these defendants refer to the judgment in the district court of Neuces county, in number 777 on the docket there, and style- H. W. Berry and Martin Ynojosa, as sur. executors of H. L. Kinney, deceased, *vs.* Lucien Birdseye, as shown in the transcript in the causes, and prays that the same be considered as a part of this motion.

8th. The said J. W. Ward and J. C. Russell, who claim an interest with plaintiff in this suit, were at the institution of the same and still are residents of the county of Nueces, State of Texas.

And defendants pray that the affidavit of E. R. Oliver, one of the defendants, as to certain facts herein, and herewith filed 41 herewith, may be considered herewith and this said cause be remanded.

McCAMPBELL & GIVENS,
STAYTON & KLEBERG,
Att'ys for Defendants.

And on the 4th day of November, 1885, this motion was duly heard and the court made the following orders therein, to wit:

Application for Appointment of Surveyor.

LUCIEN BIRDSEYE *vs.* F. W. SHAEFFER *et als.* } No. 226.

WEDNESDAY, *November 4th,* 1885.

Now, at this day, the application of the plaintiff for the appointment of a surveyor to make a survey of the premises in controversy in this suit coming on to be heard, and having been duly considered by the court the same is ordered to be, and it is hereby, granted and allowed.

It is therefore considered and ordered by the court that the county surveyor of Nueces county, State of Texas, be, and he is hereby, appointed surveyor to make a full and complete survey of the grant of land claimed by plaintiff, known as the "Rincon del Oso," in said county of Nueces, and of the "Rincon Corpus Christi," and "Barranco Blanco" grants, in the "Rincon del Oso" grant, and also of the lands claimed by the defendants, and that the parties plaintiff and defendants furnish said surveyor their respective title papers or copies thereof to guide him in making such survey.

It is further considered and ordered by the court that said surveyor be, and he is hereby, directed and required to proceed to make such surveys in accordance with the title papers or copies thereof furnished him by the said parties respectively as soon as may be, and make his report and return thereof with full and 42 complete field-notes and diagrams of such surveys to this court under oath, as required by law. Ordered that this cause be continued by argument.

* * * * * * *

WEDNESDAY, *November 4th*, 1885.

LUCIEN BIRDSEYE
vs. } No. 226.
F. W. SHAEFFER *et als.*

"It is ordered that the order heretofore entered in this cause on, to wit, *on* the 3d day of November of this present term of this court, remanding same to Nueces county, Texas, be, and the same is hereby, set aside and this cause is reinstated upon the docket for trial."

WEDNESDAY, *November 4th*, 1885.

LUCIEN BIRDSEYE
vs. } No. 226.
F. W. SHAEFFER *et als.*

"This cause coming on again to be heard upon motion of plaintiff to reinstate same, and the said motion having been fully considered by the court, is here now granted and said cause reinstated upon the docket of this court."

And that thereafter this cause was regularly proceeded with in this court, and an order of survey made on the 5th day of November, 1885, and afterwards executed and returned with the report of the surveyor, field-notes, maps, sketches, and diagrams, and filed herein on April 13th, 1887, and a large number of depositions taken by plaintiff under commissions and process from this court issued after the 3d day of March, 1887, and returned and filed herein after the 3d day of March, 1887, and before the filing of this present motion; and thereupon the plaintiff objected to the present
43 motion to remand, and moved and requested the court to
refuse and overrule same on the grounds that so much of the second section of the act of Congress of the third of March, 1887, as provides for such a proceeding in a cause wherein the jurisdiction of a circuit court of the United States had fully attached under the law of the land and the State court had been fully divested and deprived of all power and jurisdiction over the same before the passage of such act is in conflict with and contravention of the Constitution of the United States and wholly unauthorized thereby, and after hearing argument of counsel for both parties thereon the court refused and overruled such motion and request of plaintiff, and further held and ruled that such provision of the said act is not in conflict with or in contravention of the Constitution of the United States, but is authorized thereby; to which ruling and action of the court the plaintiff duly excepted in open court at the time the same was so made and done; and, time therefor being allowed by the court, the plaintiff has prepared this his bill embodying such exception, and now presents the same here in open court, praying that it be approved and allowed and made a part of the record of this cause; and, after having — duly submitted to counsel for the defendants, it is approved, allowed, and signed and ordered to be made a part of the record of this cause.

So done and ordered in open court this 8th day of December, 1888.

T. S. MAXEY, *Judge.*

Second.

Be it further remembered that when this cause had proceeded as far as and in the manner recited in the first paragraph of this 44 bill the court then proceeded to hear testimony of witnesses and documentary evidence introduced by the parties against and in favor of the said motion of the defendants to remand this cause under the provisions of the said act of March 3d, 1887, and on the question of fact whether there does exist such prejudice and local influence against the plaintiff in the county of Nueces, State of Texas, as would prevent him from obtaining justice in said district court of such county; and, having heard all the testimony, as well as argument of counsel for both parties, the court ruled the law to be with the defendants and against the plaintiff as to such motion, and sustained the same and ordered this cause to be remanded to the said State court, and adjudged the plaintiff to pay all costs by its ruling and judgment entered of record in words as follows:

LUCIEN BIRDSEYE
vs. No. 226.
F. W. SHAEFFER *et al.*

On this 6th day of December, A. D. 1888, came the parties, by their attorneys, and thereupon came on to be heard the motion of the defendants to remand this cause to the district court of Nueces county, from which it was removed to this court, and praying the court to enquire into the truth of the affidavit of the plaintiff for removal and the grounds thereof; to which action of the court, as prayed for by the defendants, the plaintiff then and there, among other things, objected, because his right to removal had been adjudicated by this court prior to the passage of the act of 3d March, 1887, under which the motion to remand by defendants was now made and his right of trial in this court was a vested right, and that the act of 3d of March, 1887, so far as it sought to enquire into the truth of the affidavit and the grounds thereof or sought 45 to establish any rule as to the question of prejudice at the time, was repugnant to the Constitution of the United States.

Whereupon, the court having heard the testimony adduced by the parties, respectively, and having duly considered the same, and it appearing to the court that the act of 3d March, 1887, under which this application to remand is made, is constitutional, and that there was no cause for removal upon the grounds set out by the plaintiff in his affidavit—

It is ordered and adjudged that this cause be remanded to the district court of Nueces county, Texas, being the State court from which it was removed to this court; to which ruling and judgment the plaintiff, by his attorneys, then and there in open court excepted.

It is further ordered and adjudged that the defendants do have and recover of the plaintiff, Lucien Birdseye, and J. W. Ward and J. C. Russell, his sureties on his bond for removal, all their costs in this behalf expended, for which execution may issue.

It is further ordered that the clerk of this court do certify this order and judgment to the district court of Nueces county, Texas.

To which ruling, action, and judgment of the court the plaintiff duly excepted in open court at the time the same was so made and done on the grounds that the same are not due course of law, but deprives the plaintiff of a trial of his rights to his property involved in this cause and of such property and of the property he has
46 acquired in all of the costs he has legally expended and all of the testimony he has taken and procured under the orders and process of this court duly made and had without due process of law and in contravention of the provisions of the Constitution of the United States, and especially those of the fifth article of the amendments thereto, and, further time being allowed therefor, the plaintiff has prepared this his bill, embodying said exception, and now presents the same here in open court, praying that it be approved, allowed, and made a part of the record of this cause, and, the same having been duly submitted to counsel for the defendants, it is approved, allowed, signed, and ordered to be made a part of the record of this cause.

So done and ordered in open court this 8th day of December, 1888.

T. S. MAXEY, *Judge.*

Endorsed: No. 226. Lucien Birdseye *vs.* F. W. Shaeffer *et als.* Bill of exceptions No. 1 taken by plaintiff. Filed Dec. 8, 1888. W. C. Robards, clerk, by W. McMaster, deputy.

Bill of Exceptions No. 2.

In U. S. Circuit Court, Western District of Texas, at San Antonio.

LUCIEN BIRDSEYE
— No. 226.
F. W. SHAEFFER *et al.*

Be it remembered that after the court had made and entered the ruling and judgment in this cause complained of and excepted to by plaintiff in his bill of exception No. 1, allowed and filed
47 herein, the plaintiff moved the court to grant him a reconsideration of such ruling and judgment by his written motion filed herein in words as follows:

In Circuit Court of the United States, Western District of Texas, at San Antonio.

LUCIEN BIRDSEYE
vs.
F. W. SHAEFFER *et als.* } No. 226.

Now come- the plaintiff and here moves the court to set aside the order of the court made herein on the 6th day of December, 1888, sustaining the motion of the defendants to remand this cause to the State court under the provisions of the second section of the act of the Congress of the United States of March 3d, 1887, and ordering this cause to be remanded and grant him a rehearing of such motion on the following grounds:

1st. Because, in so far as said section of the said act provides that causes which had been removed from State courts to the circuit courts of the United States, by full compliance with the laws of the United States, before the passage of such acts may be remanded to the State courts, it is wholly unauthorized by the Constitution and in contravention of its provisions, especially those of the nin*g*th and eighteenth subdivisions of *second* eight of article one and sections one and two of article three of — and articles five, nine, and ten of the amendments to the same.

2d. Because the const*itu*tion and application given to such sections of the said act by the court by its ruling aforesaid in this cause, over which this court had acquired complete and exclusive jurisdiction on the second day of September, 1888, and ha*d* continued to exercise such jurisdiction over it ever since, is in contravention of the provisions of the Constitution of the United
48 States, and *and* especially those of the articles, sections, and sub-
divisions thereof above referred to, and, if such ruling should be carried into effect, it would deprive the plaintiff of his privilege to have his rights to the property involved in this suit adjudicated by due course of the law of the land and would deprive him of his property without due process of law.

3d. Because the last clause or sentence of said second section of such act of Congress is not applicable to this cause, and if construed to be applicable to it, then it would be with- constitutional authority and void, and the construction given to it to make it authority to give jurisdiction to the State court over a cause brought *to* under the jurisdiction of a circuit court of the United States, in full compliance with the laws of the United States in force at the time, is unauthorized by and in contravention of the provisions of the Constitution.

4th. Because if such provisions of said act could constitutionally apply to this cause the question of fact was not determined upon the truth or otherwise of the affidavit for removal and the grounds thereof, but upon the supposed state of things in Nueces county at the present time and not at the time of the removal of the cause, and upon testimony which should [showed] such amount of prejudice and local influence in the body of the county as would, if encountered in the jury-box or *venire*, prevent the plaintiff from obtaining justice in the district court of such county and prevent such district court from being a fair and impartial tribunal as to the plaintiff or perfect- free from local influence and prejudice against him.

BETHEL COOPWOOD,
G. R. SCOTT,
HANCOCK & SHELLY,
Attorneys for Plaintiff.

49 Endorsed: No. 226. Lucien Birdseye *vs.* F. W. Shaeffer *et als.* Plaintiff'- motion for a rehearing of the motion to remand. Filed Dec. 10, 1888. W. C. Robards, clerk, by W. McMaster, deputy.

And on this 24th day of December, 1888, such motion coming on to be heard, and the court, having heard the same, as well as argument of counsel for both parties, decided the law to be with the defendants and against the plaintiffs as to such motion, and overruled the same and each and every of the grounds thereof by order to that effect entered of record in words as follows:

"MONDAY, *December 24th*, 1888.

LUCIEN BIRDSEYE
vs.
F. W. SHAEFFER *et al.*
} No. 226.

In the above-named case now comes on to be heard the motion of the plaintiff to reconsider the order of the court in said cause remanding the same to the district court of Nueces county and to set aside the said order; which motion being considered by the court, it is ordered and adjudged that the same be denied; to which ruling of the court the plaintiff then and there in open court excepted."

To which ruling and action of the court the plaintiff duly excepted in open court at the time the same were so made and done, and immediately prepared this his bill embodying such exceptions, and now tenders the same here in open court, asking its allowance; and, after being submitted to counsel for the defendants, it is approved, allowed, signed, and ordered to be made a part of the
50 record of this cause. So done and ordered in open court this 24th day of December, A. D. 1888.

T. S. MAXEY, *Judge.*

Endorsed: No. 226. Lucien Birdseye *vs.* F. W. Shaeffer *et al.* Bill of exceptions No. 2 taken by plaintiff. Filed Dec. 24, 1888. W. C. Robards, clerk, by W. McMaster, deputy.

51 Lucien Birdseye
vs.
Rowend Schaffer *et al.*
No. 226.

Lucien Birdseye
vs.
E. J. Nickerson *et al.*
227.

Lucien Birdseye
vs.
M. A. Rogers *et al.*
No. 228.

Suits pending in the United States circuit court, western district of Texas, at San Antonio, Texas.

Whereas writs of error *has* been sued out removing each of the above entitled and numbered causes into the Supreme Court of the U. S. for revision and correction of the judgment of the said circuit court therein, remanding the same to the State court from which they were removed, and the questions involved in them are the same in each of said causes, and the decision of one of them by the Supreme Court must necessarily *to* and virtually decide each of the other two; Wherefore, to save cost, expense, time, and labor, it is agreed by and between the plaintiff and defendants in each of such causes that the transcript of the record in only one of the said causes, to wit, No. 226, Lucien Birdseye *vs.* Rowend Schaeffer *et als.*, shall be printed, and the other two shall be filed in manuscript only in the Supreme Court, and the said cause No. 226 shall be presented to and determined by the Supreme Court, and the same judgment rendered therein shall be rendered in the other two.

52 It is further agreed that whatever motion may be made by the defendants in said cause No. 226 to dismiss the same shall be presented and submitted to the Supreme Court on the third Monday in December, 1889, or as soon thereafter as counsel for the respective parties can be heard thereon, and that the ruling of the Supreme Court upon such motion shall apply to and be entered in each of the other two causes.

September 11th, 1889.

BETHEL COOPWOOD,
G. R. SCOTT,
HANCOCK, SHELLY & HANCOCK,
Attorneys for Plaintiff.

STAYTON & KLEBERG,
McCAMPBELL & WELCH,
Attorneys for Defendants.

Endorsed: Agreement of parties as to three cases. Filed Sept. 13th, 1889. W. C. Robards, cl'k, by W. McMaster, deputy.

53 *Clerk's Certificate.*

I, W. C. Robards, clerk of the circuit court of the United States for the western district of Texas, at San Antonio, do hereby certify that the foregoing fifty-two pages of manuscript contains a true and correct account of all the proceedings had in said court in the case of Lucien Birdseye *vs.* Rowena Schaeffer *et al.*, in a case transferred from the district court of Neuces county, Texas, to the United States circuit court of the western district of Texas, at San Antonio, said cause being No. 226 on the docket of said circuit court.

In testimony whereof I hereunto sign my name and affix the seal of the circuit court of the United States for the western district of Texas, at San Antonio, this 16th day of September, 1889.

{The Seal of the U. S. Circuit Court, Western Dist. Texas, San Antonio.}

W. C. ROBARDS,
Clerk U. S. Circuit Court, Western District of Texas,
at San Antonio,
By W. McMASTER, *Deputy.*

Endorsed on cover: W. Texas C. C. U. S. No. 1323. Lucien Birdseye, plaintiff in error, *vs.* Rowena Shaeffer, E. R. Oliver, and John McClane. Filed October 11, 1889.

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—IN THE—

SUPREME COURT of the UNITED STATES.

LUCIEN BIRDSEYE,
Plaintiff in Error,
vs.
ROWENA SCHAEFFER, E. R. OLIVER
AND JOHN McCLANE.
No. 920.

BRIEF ON MOTION TO DISMISS.

BETHEL COOPWOOD,
JOHN HANCOCK,
Counsel for Plaintiff in Error.

J. H. HEAVIN & CO., THE PRINTERS, CORPUS CHRISTI, TEXAS.

—IN THE—

SUPREME COURT of the UNITED STATES.

LUCIEN BIRDSEYE,
Plaintiff in Error,
vs.
ROWENA SCHAEFFER, E. R. OLIVER
AND JOHN McCLANE.
Defendants in Error.
No. 920.

Brief for Plaintiff in Error on Motion to Dismiss.

STATEMENT.

This cause differs from others dismissed on a similar motion under the act of February 25, 1889, in the fact that the motion to remand was overruled in 1885, and the jurisdiction of the circuit court fully adjudicated and established under the law then in force, and the cause was thereafter proceeded with and fully prepared for trial. (Bill of Exceptions No 1, Tr. p —)

FIRST PROPOSITION.

The circuit court's jurisdiction having fully attached, the cause then stood for proceeding to trial just as if it had been originally instituted therein ; and the state court's jurisdiction was at an end.

Gordon *vs.* Longest, 16 Pet. 104
Knouse *vs.* Martin, 15 How. 208.
Kern *vs.* Heidkoper, 103 U. S. 490—3.
Baltimore & O. R. R. Co., *vs.* Koontez, 104 U. S. 14.
Davis *vs.* South Carolina, 107 U. S. 600—1.
Chesapeake & O. R. R. Co. *vs.* White, 111 U. S. 137.
National Steamship Co. *vs.* Tugman, 106 U. S. 122.
Railroad Co. *vs.* Mississippi, 102 U. S. 141.
Clark *vs.* Chicago M. & St. P. Ry. Co., 11 Fed. R. 355.

SECOND PROPOSITION.

The state court's jurisdiction being fully and legally ousted and at an end, Congress could not confer jurisdiction on it, or compel it to exercise such in the cause; and it can not exercise jurisdiction so attempted to be conferred.

Prigg *vs.* Commonwealth, 16 Pet 539.
Exparte Knowls, 5 Cal. 300.
Davis *vs.* Chaplin, 7 Conn. 244.
U. S. *vs.* Lathrop, 17 Johns. 4.
State *vs.* McBride, 2 Va. Cas. 34.
Stearns *vs.* U. S., 2 Paine, 300.
Exparte Stephens, 70 Mass. 559.

THIRD PROPOSITION.

The state court having been legally ousted of its jurisdiction and no longer having any jurisdiction in the cause, and congress having no power to confer such upon it, the order of the circuit court is tantamount to an arbitrary dismissed of the cause without the consent of plaintiff, and is such a final judgment as should support a writ of error under the act of February 25, 1889.

Elmore *vs.* Grymes, 1 Pet. 469.
D'Wolf *vs.* Rohand, 1 Pet. 476.
Caslte *vs.* Bullored, 23 How, 172.
Crane *vs* Morris, 6 Pet. 598.
Silsby *vs.* Foote, 1 Blachf. 445.

FOURTH PROPOSITION.

When, upon a *pro forma* removal, the jurisdiction of the Federal court does not legally attach in the cause, the jurisdiction of the state court is in abeyance, but *de jure* remains unimpared, and is revived as soon as the Federal court dismisses or remands the cause; but it can not be said that such is the case when the statute has been fully complied with in a cause coming within the jurisdiction of the Federal court, and it has fully adjudicated the fact and sustained its jurisdiction in the cause under the law in force at the time.

FIFTH PROPOSITION.

The plaintiff's right to have a trial of this cause in the circuit court by due course of law was fully vested and existed when the act of March 3, 1887, was passed; and such right springing from the common law, or law of the land, it was not competent for the legislative power to take it away.

Cooley's Court, Lim, (5 ed.) 445, side page 362.

ARGUMENT.

If, as the circuit court adjudicated on the first motion to remand, its jurisdiction had then legally attached in the cause, and that of the state court was at an end, and congress has no power to confer jurisdiction on the state court, and it could not exercise such so conferred, then, it is submitted, the action of the circuit court upon the last motion was, in effect, a dismissal or nonsuit without the consent of plaintiff, and therefore such a final judgment as will support the writ under the act of February 25, 1889. Under such circumstances was it due process of law to enter such a judgment under the acts of 1887-1888? Was it such exercise of the powers of government as the settled maxims of the law permit and sanction? Was it law in its regular course of administration through courts of justice—a timely and regular proceeding to judgment and execution? Does it allow or afford plaintiff a trial of the cause according to any settled course of judicial proceedings? Does it allow him a trial according to the forms of law? Does it place plaintiff's rights under the protection of any law? If these questions are answered in the negative, then how does the case stand? Again, does it not deny plaintiff the right he had under the law to his second suit within a year from the rendition of the final judgment in the first suit, and which was properly vested by this action when the jurisdiction of the circuit court attached in it? Does it not arbitrarily deprive him of his rights? Does it not violate that rule which excludes every thing that is arbitrary and capricious in legislation affecting the rights of the citizen? Does it not effect an end against plaintiff's rights prohibited by the fifth amendment to the constitution? If these are answered in the affirmative, then is it not so final in its effect as to come within the meaning of the act of February 25, 1889?

Is there not a time or state of case when a state court ceases entirely to have jurisdiction in a cause legally removed to and pending in a Federal court? If so, is it not when the Federal court has fully decided the question in favor of its jurisdiction on a motion to remand? When the state court no longer has any jurisdiction in a particular cause, can congress then pass an act by virtue of which jurisdiction can be cast upon it? If, as frequently decided, when the jurisdiction of the Federal court legally attaches, then the cause stands as if originally instituted therein, then could congress provide for a cause so originally instituted in a Federal court to be transferred to a state court?

By being driven to the institution of a new suit, either in the state or Federal court, plaintiff's right of action would be barred by the statutes of Texas; so if this motion should prevail, and the state court refuse to take jurisdiction of this cause, plaintiff would be deprived of his rights of property without a trial and without his fault.

It is respectfully submitted that this motion should not prevail.

BETHEL COOPWOOD,
JOHN HANCOCK,
Attorneys for Plaintiff in Error.

Office Supreme Court U. S.
FILED,
MAR 23 1891
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

LUCIEN BIRDSEYE, Plaintiff in Error,
v.
ROWENA SCHAEFFER, E. R. OLIVER, and JOHN McCLANE.

No. 920.

BRIEF ON MOTION TO DISMISS.

PHIL. B. THOMPSON,
J. M. VALE,
Of Counsel for Defendants in Error.

WASHINGTON, D. C.:
Gibson Bros., Printers and Bookbinders.
1891.

In the Supreme Court of the United States.

LUCIEN BIRDSEYE, PLAINTIFF IN ERROR,
v.
ROWENA SCHAEFFER, E. R. OLIVER, AND JOHN McCLANE.
} *No.* 920.

Notice of Motion to Dismiss the Writ of Error herein.

BETHEL COPELAND, Esq., San Antonio, Texas, and
JOHN HANCOCK, Esq., Austin, Tex.

GENTLEMEN : Take notice that on the 20th day of April next, at the opening of Court on that day, or as soon thereafter as counsel can be heard, we shall submit to the Supreme Court of the United States the motion hereto annexed to dismiss the writ of error in this cause.

PHIL. B. THOMPSON,
J. M. VALE,
Of Counsel for Defendants in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

LUCIEN BIRDSEYE, Plaintiff in Error,
v.
ROWENA SCHAEFFER, E. R. OLIVER, and JOHN McCLANE.
} *No.* 920.

Motion.

Now comes the defendants in error by Phil. B. Thompson, Jr., and J. M. Vale, of their counsel, and move the

In the Supreme Court of the United States.

LUCIEN BIRDSEYE, PLAINTIFF IN ERROR, *v.* ROWENA SCHAEFFER, E. R. OLIVER, AND JOHN McCLANE.	*No.* 920.

Notice of Motion to Dismiss the Writ of Error herein.

BETHEL COPELAND, Esq., San Antonio, Texas, and
JOHN HANCOCK, Esq., Austin, Tex.

GENTLEMEN: Take notice that on the 20th day of April next, at the opening of Court on that day, or as soon thereafter as counsel can be heard, we shall submit to the Supreme Court of the United States the motion hereto annexed to dismiss the writ of error in this cause.

PHIL. B. THOMPSON,
J. M. VALE,
Of Counsel for Defendants in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

LUCIEN BIRDSEYE, Plaintiff in Error, *v.* ROWENA SCHAEFFER, E. R. OLIVER, and JOHN McCLANE.	*No.* 920.

Motion.

Now comes the defendants in error by Phil. B. Thompson, Jr., and J. M. Vale, of their counsel, and move the

Court to dismiss the writ of error upon which the above-entitled cause is removed into this Court, on the ground—

1st. That there was no jurisdiction to issue the same, nor is there any jurisdiction to take cognizance of the record filed herein.

2d. Because of the judgment of the Circuit Court complained of, remanding the cause to the District Court of Nuces county, Texas, from which it had been removed for trial, was not a final judgment and cannot be reviewed by this Court.

PHIL. B. THOMPSON,
J. M. VALE,
Of Counsel for Defendants.

IN THE SUPREME COURT OF THE UNITED STATES.

LUCIEN BIRDSEYE, Plaintiff in Error,
v.
ROWENA SCHAEFFER, E. R. OLIVER, and JOHN MCCLANE.
No. 920.

Brief on Motion to Dismiss.

This is a writ of error to the Circuit Court of the United States for the Western District of Texas, issued for the purpose of bringing here for review and reversal an order of said Circuit Court remanding the cause to the District Court of Nuces county, Texas, being the State court from which it was removed to the aforesaid Circuit Court of the United States, made on the 6th day of December, A. D. 1888, and an order denying a motion to set aside said order of December 6, 1888, made on the 24th day of December, A. D. 1888.

The cause was removed to the Circuit Court of the United States for the Western District of Texas prior to the passage of the act of March 3, 1887, which provided that no appeal or writ of error from the decision of the Circuit Court remanding a cause to a State court from which it had been removed should be allowed. The order remanding this cause to the State court from which it had been removed was made subsequent to that act, but prior to the act of February 25, 1889; the writ of error was allowed on the 7th of June, A. D. 1889, subsequent to the act of February 25, 1889.

It is submitted this Court has settled that since the act of March 3, 1887, it cannot take jurisdiction of writs of error from a judgment remanding a cause to a State court when the suit was begun and removed to the Circuit Court of the United States before the act of March 3, 1887, and the cause was remanded since that act.

Wilkinson *v.* Nebraska, 123 U. S. 286.
Sherman *v.* Grinnell, 123 U. S. 679.

The Court has also held that notwithstanding the act of February 25, 1889, allowed appeals or writs of error in all cases where a final judgment or decree should be rendered in a Circuit Court of the United States, which judgment or decree involved the question of the jurisdiction of the Court, a remanding order was not a final judgment or decree within the terms of that act, and that this Court had no jurisdiction to review it. See Richmond & D. R.R Co. *v.* Theuron, 134 U. S. 45.

This decision was reaffirmed in the case of W. S. Gurnee, Jr., *et al.*, *v.* County of Patrick, 137 U. S. 601.

It is, therefore, submitted that the writ of error herein should be dismissed and judgment is prayed accordingly.

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